

REMARKS

Assignee respectfully requests reconsideration and allowance in view of the foregoing amendment and the following remarks. Assignee amends claims 39-52 without prejudice or disclaimer.

Rejection of Claims 39-54 Under 35 U.S.C. §103(a)

The Office Action rejects claims 39-54 under 35 U.S.C. §103(a) as being unpatentable over Beach et al. (U.S. Patent No. 6,728,713) ("Beach et al.") in view of Andros et al. (U.S. Patent No. 5,045,850) ("Andros et al.") and further in view of Hoffberg (U.S. Patent No. 6,850,252) ("Hoffberg"). Assignee shall explain why the combination of references fails to teach each limitation of the claims.

Claim 39 is amended to recite selecting a process for obtaining the needed performance content from at least one of a plurality of performance transmitters based on "a range of global positioning system (GPS) coordinates that can receive a broadcasting signal from respective performance transmitters." Support for this limitation is found on page 17, lines 14-21 of the present specification. Assignee respectfully submits that the combination of references fails to teach each limitation of the claims. Specifically, the final Office Action asserted that Hoffberg teaches the limitation at column 128, line 67 through column 129, line 7. Here, however, the reference discloses including in a mobile device a factor in the selection of commercial information that includes the location of the receiver, as might be obtained from a GPS system. They explain that "this would allow geographically appropriate selection of commercial information, and possibly overlay information as well, e.g., traffic reports." What fails to be disclosed is the concept of a range of GPS coordinates. The range is recited in claim 39 as one that can receive a broadcasting signal from respective performance transmitters. Assignee submits that because such a range of GPS coordinates is not taught or suggested, the selecting a

processing obtaining the needed performance content based on the range of GPS coordinates is not taught or suggested as well.

Therefore, claim 39 is patentable and in condition for allowance.

Furthermore, Assignee reiterates the previous argument with respect to the Andros et al. reference. This reference is dated from 1999 and did not possess the requisite output capacity, data storage capability, battery life, processing power and bandwidth to display media such as songs and movies. This reference merely disclosed pagers. Therefore, this reference is non-analogous to the present claims which relate to a method for receiving performance content over a network for generating a pseudo-live performance. One of skill in the art would have considered the subject matter of the disclosure of Andros et al. as well as its old age and likely discarded it as being specific to devices of insufficient ability, such as pagers. The standard of proof involved in the analysis is only by a preponderance of the evidence. In other words, the preponderance of the evidence is against a person of skill in the art likely considering the teachings of Andros et al. because it relates to a limited capacity, non-multimedia capable device in the form of a pager.

The final Office Action on page 4 asserts that it would have been obvious to one of ordinary skill in the art at the time of the invention to combine the teaching of Beach et al. with Andros et al. and Hoffberg for the purpose of determining that stored data is old or out of date by comparing latest update values and updating different types of content at different rates. Combining these teachings would cause one of skill to replace the television broadcasting capabilities taught in Beach et al. with the much more limited use of pagers from Andros et al. In a very practical sense, one of skill in the art would not likely make such a combination. MPEP 2142 states that "impermissible hindsight must be avoided and the legal conclusion must be reached on the basis of the facts gleaned from the prior art." Furthermore, and also cited in

this section of the MPEP, the Supreme Court KSR stated that the analysis supporting a rejection under 35 U.S.C. §103 should be made explicit. The Federal Circuit has stated that ‘rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.’

In the present case, if one were to combine the teachings of Beach et al. with Andros et al., in other words, blending these prior art elements “according to their established function” (MPEP 2141, Section I, last paragraph), such a blending would not yield a predictable use of prior art elements. Indeed, under the reasoning of KSR, it is quite unlikely that one of skill in the art would utilize a pager from Andros et al. in the teachings of Beach et al. As the decision maker, the Examiner must forget what he or she has been taught about the claimed invention and cast the mind back to the time the invention was made to occupy the mind of one of skill in the art. MPEP 2141.01, Section III. In this case, considering the Andros et al. reference in its entirety “as a whole, including portions that would lead away from the claimed invention,” (MPEP 2141.03, Section VI) the proposed combination would not likely have occurred to one of skill in the art at the time the invention was made. Indeed, because Andros et al. deals with pager technology of 1999, one of skill in the art would likely discard it in general inasmuch as its overall teachings would lead one of skill in the art away from technologies that deal with generating pseudo-live performances. Accordingly, claim 39 is patentable and in condition for allowance as well as its dependent claims.

Claim 46 is also amended in a similar manner to claim 39. Therefore, this claim is patentable and in condition for allowance as well as its dependent claims.

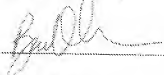
CONCLUSION

Having addressed all rejections and objections, the subject application is in condition for allowance and a Notice to that effect is earnestly solicited. If necessary, the Commissioner for Patents is authorized to charge or credit the **Novak, Druce & Quigg, LLP, Account No. 14-1437** for any deficiency or overpayment.

Respectfully submitted,

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